

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES BENSON,

Plaintiff and Appellant,

v.

KWIKSET CORPORATION et al.,

Defendants and Appellants.

G030956

(Super. Ct. No. 00CC01275)

O P I N I O N

Appeals from a judgment and postjudgment order of the Superior Court of Orange County, Raymond J. Ikola, Judge. Requests for judicial notice. Judgment affirmed. Postjudgment order affirmed. Requests granted.

The Cuneo Law Group, Jonathan W. Cuneo, Michael G. Lenett; Cuneo Waldman & Gilbert, Jonathan W. Cuneo, Michael G. Lenett; Soltan and Associates, Venus Soltan; Milberg Weiss Bershad Hynes & Lerach, William S. Lerach, Elizabeth J. Arleo and Kevin K. Green for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Assistant Attorney General, Ronald A. Reiter and Benjamin G. Diehl, Deputy Attorneys General, for California Attorney General as Amicus Curiae on behalf of Plaintiff and Appellant.

Jones, Bell, Abbott, Fleming & Fitzgerald, Michael J. Abbott, Fredrick A. Rafeedie and William M. Turner for Defendants and Appellants and for Amicus Curiae Leatherman Tool Group, Inc. on behalf of Defendants and Appellants.

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Plaintiff James Benson, on behalf of the general public, sued defendants Kwikset Corporation (Kwikset), its parent corporation, Black & Decker Corporation (Black & Decker), plus Technolock, S. A. de C. V. (Technolock) for restitution and injunctive relief under the unfair competition law (Bus. & Prof. Code, § 17200; UCL) and the false advertising law (Bus. & Prof. Code, § 17500; section 17500). He alleged defendants violated statutory provisions prohibiting the marketing or sale of merchandise with “Made in U.S.A” or similar labels when the merchandise either contained foreign-made parts or involved foreign manufacture.

The trial court entered judgment for plaintiff enjoining Kwikset and Black & Decker (collectively defendants) from distributing locksets in California with inaccurate country of origin labels, and also ordered them to notify retailers and distributors they could return mislabeled locksets for either a refund or replacement with properly labeled products. By a postjudgment order, the court awarded plaintiff statutorily authorized costs, plus his attorney fees under Code of Civil Procedure section 1021.5. The court also awarded Technolock its costs.

Both plaintiff and defendants appeal. Defendants challenge the constitutionality and applicability of Business and Professions Code section 17533.7 (section 17533.7) which makes it unlawful “to sell or offer for sale . . . any merchandise on which . . . there appears the words ‘Made in U.S.A.’ . . . or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.” They also attack the trial

court's interpretation of Civil Code section 1770, subdivision (a)(4) (section 1770(a)(4)), declaring the use of "deceptive representations . . . of geographic origin in connection with goods and services" as unlawful. Defendants also contend plaintiff failed to present legally adequate extrinsic evidence to establish their labels were likely to mislead the reasonable consumer.

For his part, plaintiff attacks the portions of the judgment declaring the provisions of the Federal Trade Commission Act (15 U.S.C. § 45 et seq.) cannot serve as predicate statutes for a UCL claim, and the extent of the restitutionary relief awarded by the trial court. Plaintiff also appeals from the postjudgment costs order, arguing the trial court erred both in awarding Technolock costs and in denying an award of its own out-of-pocket litigation expenses that were not recoverable as costs.

We reject both parties' claims and affirm the judgment and the postjudgment order.

## FACTUAL AND PROCEDURAL BACKGROUND

Kwikset manufactures and sells hardware described as locksets, which can include deadbolts, doorknobs sets, door lever sets, and door handle sets. It has several plants located throughout the United States, plus one in Mexico. Between 1996 and 2000, Kwikset manufactured and sold 35 different varieties of locksets. Plaintiff presented evidence that defendants' attached labels to these products stating "Made in U.S.A.," "All American Made," or similar representations. However, some of these products included screws and pins made in Taiwan, a latch assembly that was sub-assembled at defendants' Mexico plant, or both foreign made parts and assembly.

Plaintiff testified a product label stating "Made in the USA" meant to him "that whatever is in that package should be made – the parts, labor, and the whole component should be made in [the] USA." He purchased Kwikset products "[b]ecause

they had a reputation for being . . . quality product[s], and I was aware they were made in the USA.” Based on what he subsequently learned about the manufacture of Kwikset’s products, he did not believe its country of origin labels were honest.

Plaintiff also called two other witnesses who had purchased Kwikset products. Both witnesses testified a “Made in U.S.A.” or similar label was an important factor in their purchasing decision, they interpreted the label to mean all of the parts and all of the labor used to manufacture the product occurred here, and felt they had been deceived by the country of origin labels on Kwikset’s products.

After plaintiff filed this action, Kwikset decided to stop using country of origin labels on its products, completing the process of removing them from products distributed in California by October 2000. In addition, as a result of a subsequent and unrelated investigation by the United States Federal Trade Commission, defendants entered into a consent order. It precludes defendants from: (1) representing “in any manner . . . the extent to which any . . . product” distributed in interstate commerce “is made in the United States” unless “all, or virtually all, of the component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States”; and (2) using “the legend ‘All American Made,’ . . . or otherwise represent[ing] that a product is entirely made in the United States unless such product is in fact 100% made in the United States.”

After trial in this case, the court issued a 21-page statement of decision. It rejected plaintiff’s reliance on sections 45 and 45a of the Federal Trade Commission Act, concluding the act did not provide a private right of action. As for section 17533.7, the court recognized it “is an extremely strict statute” but rejected defendants’ claim the law was unconstitutional. It construed the section as precluding a “‘Made in USA’ label where the ‘merchandise’ is entirely or substantially foreign,” or “where any ‘article, unit, or part thereof’ is entirely or substantially foreign.” Applying this construction, the court found certain Kwikset products manufactured between 1996 and 2000, at one point or

another bore unlawful country of origin labeling because the products contained either “a screw or pin made ‘entirely . . . outside of the United States,’” or had a “latch assembly that was sub-assembled in Mexico . . . .”

The court also found section 1770(a)(4) applied, but since this statute was “not [as] strict,” a violation of it would occur only when, viewing “the labeling from the perspective of those consumers for whom the geographic designation is important,” “the merchandise as a whole is deceptively labeled.” Under this construction, the court concluded “locksets that incorporate only a few screws or pins made in Taiwan are not deceptively labeled with a ‘Made in USA’ label, but are deceptively labeled with an ‘All American Made’ label.” In addition, “a lockset incorporating a latch assembly that was sub-assembled in Mexico is deceptively labeled with either designation.” The court identified several Kwikset products containing labels that violated section 1770(a)(4). With respect to section 17500, the trial court “applie[d] the same analysis . . . as . . . the alleged violation of section 1770[(a)(4)].”

Although recognizing defendants “ceased all use of the USA designation on all of their locksets” in early 2000, “the court conclude[d] that it is appropriate to assure compliance with . . . California [law] . . . by enjoining defendants . . . from labeling any lockset intended for sale in the State of California ‘All American Made,’ or ‘Made in USA,’ or similar unqualified language, if such lockset contains any article, unit, or part that is made, manufactured, or produced outside of the United States.” In addition, the court ordered defendants to notify “retailers, dealers and distributors” in California “that any lockset in the[ir] . . . inventory that contains the ‘Made in USA’ or ‘All American Made’ or similar designation may be returned . . . for replacement with an equivalent item in compliant packaging, or . . . a refund of the original purchase price.” However, balancing the equities, the court declined to “order a return or refund program as to the ultimate consumers . . . .”

Finally, the court directed the entry of judgment in favor of defendant Technolock, “find[ing] no evidence whatever of any wrongdoing on its part that would warrant relief against” it.

## DISCUSSION

### DEFENDANTS’ APPEAL

#### *Plaintiff’s UCL Claims*

The complaint contained three counts under the UCL and one count alleging a violation of section 17500 for false advertising.

The UCL permits a party to seek injunctive and restitutionary relief for any “unlawful, unfair or fraudulent business act or practice . . . .” (Bus. & Prof. Code, §§ 17200, 17203 & 17204.) Thus, “section 17200 ‘borrows’ violations of other laws and treats them as unlawful practices’ that the unfair competition law makes independently actionable. [Citations.]” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; see also *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515.)

Citing sections 17533.7, 1770(a)(4), and 17500, plus provisions of the Federal Trade Commission Act, plaintiff argued defendants’ “Made in U.S.A.” and similar product labeling constituted an unlawful business practice. The trial court found all three state laws supported the first cause of action. In addition, relying on the latter two statutes, the court granted plaintiff relief on his causes of action for “unfair” and “fraudulent” business acts and practices. Defendants challenge applicability of each of the predicate statutes on different grounds.

### *Section 17533.7*

Section 17533.7, part of the false advertising law, declares, “It is unlawful for any person, firm, corporation or association to sell or offer for sale in this State any merchandise on which merchandise or on its container there appears the words ‘Made in U.S.A.,’ ‘Made in America,’ ‘U.S.A.,’ or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.” A violation of this statute constitutes a misdemeanor. (Bus. & Prof. Code, § 17534.)

Defendants contend section 17533.7 is unconstitutional because it “‘chills’ constitutionally protected speech,” and fails to “provide fair notice of the conduct which it prohibits” or “explicit standards” for its enforcement. Alternatively, they challenge the trial court’s interpretation and application of the statute to this case. These contentions lack merit.

### *“Chilling” Effect*

Defendants’ claim section 17533.7 “chills” constitutionally protected speech is without merit. In reviewing a constitutional attack on a statute, we begin with the presumption that the law is valid unless its constitutional infirmity is “clearly, positively, and unmistakably” established. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107; *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484.)

Given the nature of the labels, plus the fact defendants attached them to Kwikset’s products, the labels amounted to commercial speech. (*Kasky v. Nike, Inc.*, (2002) 27 Cal.App.4th 939, 956-957; *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1227.) While commercial speech is afforded protection by the First Amendment, “[t]he [federal] Constitution accords less protection to commercial

speech than to other constitutionally safeguarded forms of expression.’ [Citation.]” (*Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 952.)

In analyzing commercial speech, the first step is to determine whether it involves lawful activity and is not misleading. (*Ibid.*; *Keimer v. Buena Vista Books, Inc.*, *supra*, 75 Cal.App.4th at p. 1230.) While product labeling is lawful activity, the labels here were misleading in their description of where the respective products had been produced or manufactured.

The second question is whether California has a substantial interest in enacting section 17533.7 and similar laws. Section 17533.7 appears in the chapter of the Business and Professions Code covering false advertising. “Clearly, the State of California has a fervent interest in protecting the public from advertising which is deceptive or is likely to deceive and in “. . . insuring that the stream of commercial information flow cleanly as well as freely.” [Citations.]’ [Citation.]” (*Keimer v. Buena Vista Books, Inc.*, *supra*, 75 Cal.App.4th at p. 1230; see also *People v. Superior Court* (1979) 96 Cal.App.3d 181, 193.) Section 17533.7 constitutes a legislative determination that representations suggesting merchandise was made in the United States are misleading unless they satisfies the strictures of the statute.

Third, although, as the trial court noted, section 17533.7 is a strict law, it nonetheless advances the state’s interest in protecting the public from deceptive product representations. Fourth, given its specificity, referring to both merchandise as a whole, and to the constituent articles, units, or parts of merchandise, section 17533.7 is reasonably tailored to serve the interest of prohibiting deceptive product advertising. (*Keimer v. Buena Vista Books, Inc.*, *supra*, 75 Cal.App.4th at p. 1231.) Thus, we find section 17533.7 does not violate defendants’ free speech rights.



### *Vagueness*

We also reject defendants' void-for-vagueness challenge to section 17533.7. "To satisfy the constitutional command [of certainty], a statute must meet two basic requirements: (1) the statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines . . . to prevent arbitrary and discriminatory enforcement. [Citations.]" (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th at pp. 1106-1107.) But "[o]nly a reasonable degree of certainty is required . . . ." (*Id.* at p. 1107.) A statute ""cannot be held void for uncertainty if any reasonable and practical construction can be given to its language."" [Citation.]" (*Ibid.*; *Walker v. Superior Court* (1988) 47 Cal.3d 112, 143.)

"In considering whether a legislative proscription is sufficiently clear to satisfy the requirements of fair notice, 'we look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language.' [Citations.] We thus require citizens to apprise themselves not only of statutory language but also of legislative history, subsequent judicial construction, and underlying legislative purposes [citation]." (*Walker v. Superior Court, supra*, 47 Cal.3d at p. 143.) The Legislature's intent "as exhibited by the plain meaning of the actual words of the law," must be followed ""whatever may be thought of the wisdom, expediency, or policy of the act."" [Citations.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-633; see also *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

As for the requirement that section 17533.7 give defendants fair notice of what is proscribed, the mere fact they were attaching "Made in U.S.A." and similar labels to locksets built using foreign-made components and partially assembled at their Mexico plant should have alerted defendants to the possibility they were in danger of violating the statute. *Burg v. Municipal Court* (1983) 35 Cal.3d 257 presents an analogous situation. It rejected a void-for-vagueness challenge to a law making it illegal for a

person to drive with a blood alcohol content of 0.10 percent or more. In response to the petitioner's claim it was impossible for him to know when his blood alcohol had reached this limit, the court noted, "[t]he very fact that he has consumed a quantity of alcohol should notify a person of ordinary intelligence that he is in jeopardy of violating the statute. [Citation.]" (*Id.* at p. 271.)

The second requirement is that the statute affords sufficiently definite guidelines for enforcement of the law. Focusing on the term "substantially," defendants figuratively throw up their hands, claiming it "is not defined by the statute or any other authority" and the dictionary definition of this term "provides no guidance as to what percentage of the total making, manufacturing, or production of merchandise or any part thereof will constitute 'substantially.'" We disagree.

Contrary to defendants' claim, the term "substantially" has been judicially construed. (*Atchison etc. Ry. Co. v. Kings Co. Water Dist.* (1956) 47 Cal.2d 140, 144 ["Substantially" means "'in a substantial manner; really, solidly; competently'"].) Use of the term "substantially" in criminal statutes has also been approved. (*People v. Box* (2000) 23 Cal.4th 1153, 1217 ["substantial" used to describe capital sentencing factors; upheld]; *People v. Silver* (1991) 230 Cal.App.3d 389, 393-394 [affirming conviction of possessing for sale a chemical substance with a "chemical structure . . . substantially similar to" methamphetamine].)

The premise of defendants' argument, that use of the term "substantially" fails to provide adequate "standards for . . . juries[] and judges" to apply, is answered by the Supreme Court's opinion in *People v. Daniels* (1969) 71 Cal.2d 1119: "The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' '*substantial*,' and the like. Indeed, a wide spectrum of human activities is regulated by such terms: thus one man may be given a speeding ticket if he overestimates the 'reasonable or prudent' speed to drive his car in the circumstances [citation], while

another may be incarcerated in state prison on a conviction of wilful homicide if he misjudges the ‘reasonable’ amount of force he may use in repelling an assault [citation]. . . . ‘There is no formula for the determination of reasonableness.’ Yet standards of this kind are not impermissively vague, provided their meaning can be objectively ascertained by reference to common experiences . . . .” (*Id.* at pp. 1128-1129, *italics added.*) Thus, we conclude section 17533.7 is not void for vagueness.

### *Construction of Section 17533.7*

The trial court interpreted section 17533.7 to preclude the use of labels describing merchandise as “Made in the U.S.A.” or containing a similar import when either (1) “the merchandise . . . has been entirely or substantially made, manufactured, or produced outside of the United States,” or (2) “any article, unit, or part” of “the merchandise” “has been entirely or substantially made, manufactured, or produced outside of the United States.” (§ 17533.7.) Defendants and our dissenting colleague challenge the correctness of this interpretation. We agree with the trial court’s approach.

In construing statutes, our goal is to determine the intent of the Legislature to thereby effectuate the purpose of the law. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) “‘Our first step [in determining the Legislature’s intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. [Citations.]’ [Citation.]” (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, *supra*, 14 Cal.4th at p. 633.) “It is our task to construe, not to amend, the statute. ‘In the construction of a statute . . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted . . . .’ [Citation.] We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.” (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

As previously noted, when interpreting a statute a court may refer to prior judicial construction of its terms (*Walker v. Superior Court, supra*, 47 Cal.3d at p. 143) and should employ the common usage and understanding of the statute's words. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 69; *Smith v. Peterson* (1955) 131 Cal.App.2d 241, 246.) Finally, a court must give meaning to every word in the statute and avoid a construction that renders any of the law's terms surplusage. (*Reno v. Baird* (1998) 18 Cal.4th 640, 658.)

Application of these principles confirms the trial court read the statute correctly. First, by its repeated use of the term "merchandise," section 17533.7 is limited to personal property such as goods and wares that are bought and sold in the marketplace. (*United States v. Sisco* (1914) 262 U.S. 165, 168 [43 S.Ct. 511, 67 L.Ed. 925]; *Blackwood v. Cutting Packing Co.* (1888) 76 Cal. 212, 214; Black's Law Dict. (7th ed. 1999) p. 1000, col. 2.) Consequently, the law does not cover other forms of property.

Second, section 17533.7 regulates the use of "Made in U.S.A." and similar labeling only on merchandise that is "made, manufactured, or produced." "The words 'made, manufactured, or constructed' cover almost everything which [human] skill . . . can make out of raw materials." (*United States v. Anderson* (S.D.Cal. 1942) 45 F.Supp. 943, 949.) "[T]here are many [judicial] holdings and statements to the effect that, to constitute manufacturing, . . . the operation, process, or activity in question must result in the production of a new and different article, product, or commodity, having . . . a distinctive name, character, or use. 'Manufacturing,' in this connection, has also been defined, in terms or substance, as the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery . . . ." (Annot., What Constitutes Manufacturing or Who Is a Manufacturer Under Tax Laws (1968) 17 A.L.R.3d 7, 23-24, fns. omitted.) Thus, we conclude the statute would not apply merely because

merchandise entirely made, manufactured, or produced in the United States incorporates raw materials acquired from a foreign source.

Where merchandise is entirely made, manufactured, or produced outside the United States, the use of “Made in U.S.A.” labels is clearly prohibited. However, the statute also prohibits the use of this labeling where merchandise is “*substantially* made, manufactured, or produced outside of the United States.” (§ 17533.7, italics added.) Recently, the United States Supreme Court construed the term as used in the Americans with Disabilities Act. “[S]ubstantially’ . . . suggests ‘considerable’ or ‘to a large degree.’ See Webster’s Third New International Dictionary 2280 (1976) (defining ‘substantially’ as ‘in a substantial manner’ and ‘substantial’ as ‘considerable in amount, value, or worth’ and ‘being that specified to a large degree or in the main’); see also 17 Oxford English Dictionary 66-67 (2d ed.1989) (‘substantial’: ‘[r]elating to or proceeding from the essence of a thing; essential’; ‘[o]f ample or considerable amount, quantity, or dimensions’). . . .” (*Toyota Motor Mfg., Kentucky, Inc. v. Williams* (2002) 534 U.S. 184, 196-197 [122 S.Ct. 681, 151 L.Ed.2d 615].) Applying a similar approach here, we conclude merchandise has been “substantially made, manufactured, or produced outside the United States” where the foreign operation, process, or activity employed to create the merchandise is found to be considerable in either amount, value, or worth.

More apropos to this case, if the merchandise at issue consists of separate, identifiable components, section 17533.7 requires “*any* article, unit, or part” of the merchandise to be “entirely or substantially made, manufactured, or produced” domestically to qualify for use of a “Made in U.S.A.” or similar label. (§ 17533.7, italics added.) We accord these terms their usual and ordinary meanings: (1) “Article” includes “a material thing: item, object,” or “a thing of a particular class or kind as distinct from a thing of another class or kind” (Webster’s 3d New Internat. Dict. (1981) p. 123, capitalization omitted); (2) “Unit” means “a single thing . . . that is a constituent and

isolable member of some more inclusive whole” and “a piece or complex of apparatus serving to perform one particular function” (*id.* at p. 2500); and (3) “Part” means “a unit . . . held to constitute with one or more other units something larger: constituent . . . an essential portion or integral element of something” (*id.* at p. 1645, capitalization omitted). In light of these definitions, when merchandise consists of two or more physical elements or pieces, section 17533.7 also applies to *any* distinct component of merchandise that is necessary for its proper use or operation.

Kwikset manufactured locksets using screws and pins made in Taiwan. Screws and pins are distinct components clearly necessary to the proper use or operation of a lockset because without them one could not install or operate the product. In addition, part of the lockset latch assembly for some products occurred at Kwikset’s Mexico plant. It is settled that product assembly is part of the manufacturing process. (*General Motors Corp. v. City of Los Angeles* (1971) 5 Cal.3d 229, 240.)

The trial court found the latch sub-assembly performed in Mexico constituted a *substantial* portion of the manufacturing process. This determination presented a factual question. While defendants argue their assembly process substantially complied with section 17533.7 and challenge the trial court’s application of the statute to their lockset labeling, they cite to only bits and pieces of the evidence. To sustain an insufficiency-of-the-evidence claim on appeal, an appellant must set forth all material evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.) Here, in the absence of an adequate summary of the trial record, we deem defendants’ evidentiary challenge waived and presume the evidence supports the trial court’s findings. (*Ibid.*)

At our request, the parties provided us with section 17533.7’s legislative history. The Legislature enacted section 17533.7 in 1961 and has never amended it. (Stats. 1961, ch. 676, § 1, p. 1915.) Plaintiff notes two unsuccessful attempts to amend the law, one that would have eliminated the reference to “any article, unit, or part” of

merchandise, and a second seeking to insert a percentage of manufacture test. As the Attorney General notes, legislative inaction is of very “little value” in construing the terms of a statute. (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922-923.) To the extent one can draw any conclusion from the legislative history, it is that the Legislature was made aware of concerns about the breadth of section 17533.7’s scope and declined to narrow it.

Defendants, and the dissent, extensively employ hypotheticals not relevant to the facts of this case to argue at length concerning section 17533.7’s potentially “absurd” consequences. We acknowledge that difficulties may arise in applying section 17533.7 to marginal situations. But this case does not present such circumstances.

We share our dissenting colleague’s angst about both the effect of this law, particularly in an age of global trade, and the potential for abuse that may arise under the UCL. If we had the power to do so, we would rewrite the statute to address those concerns. But our Supreme Court has cautioned “‘the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government . . . .’ [Citation.] It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. ‘This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.’ [Citations.]” (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, *supra*, 14 Cal.4th at p. 633.) Finally, neither the wisdom of the law nor the availability of alternative, less drastic remedies is a proper factor for our consideration. (*Burg v. Municipal Court*, *supra*, 35 Cal.3d at p. 267.)

We thus conclude the trial court properly interpreted and applied section 17533.7 to the facts of this case.

*Section 1770(a)(4)*

The second predicate statute supporting plaintiff's UCL claim is section 1770(a)(4). It declares, "[t]he following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

[¶] . . . [¶] (4) Using deceptive representations or designations of geographic origin in connection with goods or services."

In its statement of decision, the court applied section 1770(a)(4) as follows: "The evidence did establish that there are those citizens for whom the 'Made in USA' label is an important part of their buying decision. Obviously, there are many others for whom the geographic origin has little or no importance. A deceptive label to one person may not be a deceptive label in the view of others. However, the court concludes that it must view the labeling from the perspective of those consumers for whom the geographic designation is important, but must do so reasonably."

Defendants argue the trial court employed an incorrect legal standard in determining whether their country of origin product labeling was deceptive under section 1770(a)(4). Referring to the Federal Trade Commission Act, defendants argue the correct test is whether "there is a representation, omission, or practice that . . . is likely to mislead consumers acting reasonably under the circumstances, and . . . the representation omission, or practice is material . . . ."

Recently, the Second District held "the reasonable consumer standard" applies to actions involving claims under the Consumer Legal Remedies Act of which section 1770(a)(4) is a part. (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360.) That standard is aptly described in *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496: "Where advertising is aimed at a particularly susceptible audience . . . , its truthfulness must be measured by the impact it will likely have on members of that group, not others to whom it was not primarily directed.



[Citation.] We also recognize that an advertisement may be designed to appeal to specific groups of consumers, although it is ostensibly directed to the public at large. Where the plaintiff contends that a more vulnerable subgroup is the true target of such an advertisement, a question of fact is presented, which the trial court must resolve. [¶] However, unless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer. [Citation.]” (*Id.* at pp. 506-507.)

The trial court’s approach complied with this standard. It recognized that not everyone is swayed by the presence of a “Made in U.S.A.” or similar label when deciding to purchase merchandise. But here plaintiff presented testimony, and the trial court found, that for some people country of origin labeling is a critical factor when making a purchasing decision. In addition, the court also recognized the need for an element of reasonableness on the part of a prospective purchaser. The validity of the trial court’s finding presented a factual question. Again, defendants failed to adequately preserve the issue for review. (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *Toigo v. Town of Ross, supra*, 70 Cal.App.4th at p. 317.) Consequently, we find the trial court applied the appropriate standard for deception in finding defendants violated section 1770(a)(4).

#### *Defendants’ Extrinsic Evidence Claim*

As to both sections 1770(a)(4) and 17500 as predicate statutes under the UCL, plus the merits of plaintiff’s fourth cause of action for unlawful advertising, defendants argue plaintiff introduced merely “anecdotal evidence” in the form of oral testimony by consumers who claimed they were misled by the country of origin labels. Defendants rely on two federal decisions they assert mandate a UCL claim be based on extrinsic evidence such as a consumer survey. (*Churchill Village L.L.C. v. General Electric Co.* (N.D.Cal. 2000) 169 F.Supp.2d 1119, 1131; *Haskell v. Time, Inc.* (E.D.Cal.

1997) 965 F.Supp. 1398, 1407.) Since plaintiff did not present any such evidence, defendants contend the judgment on these grounds must be reversed.

This argument was recently considered and rejected in *Brockey v. Moore* (2003) 107 Cal.App.4th 86. *Brockey* involved a successful action by mobile home tenants against one who, although not a lawyer, operated businesses named “Legal Aid” and “Legal Aid Services,” and accepted monies from the plaintiffs to assist them in defending unlawful detainer actions. On appeal, the defendant argued the evidence failed to support the judgment. Citing the foregoing federal cases, he claimed the tenants “had to prove ‘via extrinsic evidence’ that his misstatements would likely deceive a reasonable person (not merely a vulnerable person) and that what he terms ‘anecdotal’ evidence, that is, testimony by people that they were in fact misled, is insufficient.” (*Id.* at p. 99.)

The Court of Appeal rejected this argument, stating “‘that the primary evidence in a false advertising case is the advertising itself.’ The United States Supreme Court has rejected a claim that survey evidence was required in the analogous context of the Federal Trade Commission’s regulation of deceptive advertising. [Citations.] [¶] In trade name disputes and cases construing California’s prior unfair competition law (former Civ. Code, § 3369), the courts acknowledged that the ‘likelihood of confusion’ between names was a factual question, but in some cases ‘the comparison of the two names themselves may be adequate to establish the likelihood of confusion.’ [Citations.]” (*Brockey v. Moore, supra*, 107 Cal.App.4th at p. 100.)

As for the extrinsic evidence argument, the court concluded the defendant “fails to cite a single California case requiring use of survey evidence in unfair business practices cases . . . . Generally, [the federal cases cited by the defendant] involve a very few persons claiming to be misled and do not hold that ‘anecdotal’ evidence can never suffice. [Citation.] The Attorney General points out and [the defendant] concedes that these cases have imported into the California UCL standards of proof derived from federal Lanham Act cases, where misleading, rather than false, statements must be shown

to have deceived a ‘significant portion’ of the recipients. [Citation.] We are not persuaded that these cases accurately reflect California law.” (*Id.* at p. 99.)

We find *Brockey*’s analysis persuasive. In light of that decision, defendants’ sufficiency of the evidence claims concerning section 1770(a)(4) and section 17500 fail.

### *Attorney Fees*

The trial court awarded plaintiff nearly \$3 million in attorney fees under Code of Civil Procedure section 1021.5. The final page of defendant’s opening brief asserts “[b]ecause the trial court’s judgment must be reversed for the reasons set forth . . . above, the trial court’s order awarding . . . fees . . . must be reversed.” We agree with our dissenting colleague’s assertion that the award appears to be unnecessarily high. However, defendants challenge only plaintiff’s right to recover fees, not the amount approved by the trial court. Given our affirmance of the judgment and defendant’s failure to challenge the amount of fees, we have no option but to affirm the award.

## PLAINTIFF’S APPEAL

### *Introduction*

Plaintiff’s appeal presents five claims, but only three of them require extensive review. First, plaintiff contends the trial court erred when it found sections 45 and 45a of the Federal Trade Commission Act did not constitute predicate statutes supporting his UCL claim. Because we affirm the trial court’s judgment as to sections 17533.7, 1770(a)(4), and 17500, the applicability of the Federal Trade Commission Act is moot. (See *Forbes v. Cameron Petroleums, Inc.* (1978) 83 Cal.App.3d 257, 267.)

Second, plaintiff’s brief asserted the trial court erred by denying his request for restitution to consumers who purchased Kwikset’s unlawfully labeled products. By

letter received shortly before oral argument, plaintiff advised the court he has abandoned this issue. We now turn to the remaining three issues.

### *Sufficiency of Restitution*

In the judgment, the trial court directed defendants to advise California retailers and distributors that improperly labeled products still in their inventory could be returned “for replacement with an equivalent item in compliant packaging, or, at [d]efendants’ option, a refund . . . .” Plaintiff contends the trial court erred by allowing defendants to choose the form of restitution to retailers and distributors, claiming it effectively made the decision to grant any restitution “optional.”

A trial court has “very broad” discretion in formulating equitable relief in UCL actions. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 180.) “Section 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court ‘*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or . . . to restore . . . money or property.’ [Citation.] That is, as our cases confirm, a grant of broad equitable power. A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute.” (*Ibid.*)

No abuse of discretion appears in this case. The sole issue was the deceptive nature of defendants’ country of origin product labeling. No issue was raised concerning the operation of the locksets. Thus, offering refunds or repackaging of the same merchandise would be permissible.

### *The Award of Costs to Technolock*

Next, plaintiff attacks the portion of the trial court’s postjudgment order allowing Technolock to recover its costs. Plaintiff claims “Technolock . . . is united in

interest with, and made identical defenses as, its co-[d]efendants Kwikset and Black & Decker, both of which were losing parties in this case.”

Generally, the term “[p]revailing party” includes . . . a defendant as against those plaintiffs who do not recover any relief against that defendant.” (Code Civ. Proc., § 1032, subd. (a)(4).) Cases recognize the application of this provision is discretionary where a prevailing defendant was “united in interest and shared the same counsel” as another defendant found to be liable. (*Slavin v. Fink* (1994) 25 Cal.App.4th 722, 725-726; see also *Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920.) Here, the issue concerned not the manufacture of the locksets, but rather the deceptive nature of the country of origin labels placed on the packaging. There is no indication Technolock participated in this activity. Thus, the trial court did not abuse its discretion in awarding costs to Technolock.

#### *The Denial of Plaintiff’s Litigation Expenses*

Citing Code of Civil Procedure section 1021.5, plaintiff sought to recover, in addition to attorney fees, over \$400,000 in litigation expenses which included fees for expert witness and investigators, plus charges for long distance telephone calls, copying, faxes, overnight deliveries, messenger services, and other miscellaneous charges not statutorily eligible to be recovered as costs. As noted, the trial court awarded plaintiff his attorney fees, but denied the “request for an award of additional costs, not recoverable as part of the normal cost bill . . . .” Plaintiff’s final contention is that the trial court erred by denying this request. We disagree.

Under California law, the right to recover costs is purely a creature of statute, and the extent of a party’s right to recover costs is measured thereby. (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989; *Davis v. KGO-TV, Inc.* (1998) 17 Cal.4th 436, 439; *Estate of Johnson* (1926) 198 Cal. 469, 471.) Thus, absent statutory authorization, parties engaged in civil litigation must bear their own expenses in a

lawsuit. (*Davis v. KGO-T.V., Inc., supra*, 17 Cal.4th at p. 439; *Ripley v. Pappadopoulos* (1994) 23 Cal.App.4th 1616, 1622.)

Code of Civil Procedure section 1032, subdivision (b) declares, “[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” The costs allowable under this statute are listed in Code of Civil Procedure section 1033.5, subdivision (a). But subdivision (b) of section 1033.5 identifies expenses that “are not allowable as costs, except when expressly authorized by law . . . .” They include the type of expenses plaintiff unsuccessfully sought to recover in the trial court: “(1) Fees of experts not ordered by the court. [¶] (2) Investigation expenses in preparing the case for trial. [¶] (3) Postage, telephone, and photocopying charges, except for exhibits. [¶] (4) Costs in investigation of jurors or in preparation for voir dire. [¶] (5) Transcripts of court proceedings not ordered by the court.” (Code Civ. Proc., § 1033.5, subd. (b).)

Plaintiff claims he is entitled to recover these expenses under Code of Civil Procedure section 1021.5 and *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, which held “expert witness fees and other nonrecoverable expenses incurred by counsel may be awarded under section 1021.5 if, as is undisputed here, they represent expenses ordinarily billed to a client and are not included in the overhead component of counsel’s hourly rate. [Citation.]” (*Id.* at pp. 1421-1422, fn. omitted.) His argument and authority are unpersuasive.

Code of Civil Procedure section 1021.5 authorizes an award of “*attorneys’ fees* to a successful party against . . . opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest . . . .” (Italics added.) In civil litigation, costs are usually defined as the expenses and charges incurred in litigation other than attorney fees. (*Davis v. KGO-T.V., Inc., supra*, 17 Cal.4th at p. 439; *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 Cal.App.4th 592, 597.)

Similarly, plaintiff’s reliance on *Beasley v. Wells Fargo Bank, supra*,

235 Cal.App.3d 1407 fails. To support its conclusion, *Beasley* cited a series of lower federal court decisions that approved the award of expert witness fees and other expenses under a private attorney general theory. (*Id.* at pp. 1420-1421.) Then it noted the California Legislature enacted Code of Civil Procedure section 1021.5 in response to the United States Supreme Court's subsequent decision in *Alyeska Pipeline Co. v. Wilderness Society* (1975) 421 U.S. 240, 260-269 [95 S.Ct. 1612, 44 L.Ed.2d 141], which declared, absent statutory authorization, federal courts could not award attorney fees under a private attorney general theory. *Beasley* thus concluded "we must assume the Legislature intended to adopt the pre-*Alyeska* federal practice of awarding expert witness fees and similar expenses when attorney fees were recoverable in private attorney general cases, consistent with the guiding purpose of encouraging public interest litigation." (*Beasley v. Wells Fargo Bank, supra*, 235 Cal.App.3d at p. 1421.)

The flaw in this reasoning is that, while the Legislature may have relied on the earlier federal cases in drafting Code of Civil Procedure section 1021.5, it only authorized the recovery of "*attorneys' fees*," not other litigation expenses. "In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include such costs and costs do not include attorney fees. [Citations.] This is too well established in too many different contexts to be doubted." (*Ripley v. Pappadopoulos, supra*, 23 Cal.App.4th at p. 1626.)

We presume that, when enacting section 1021.5, the Legislature was aware of existing judicial decisions distinguishing between costs and attorney fees and adopted the statute in light of that construction. (*Estate of McDill* (1975) 14 Cal.3d 831, 839; *Moore v. State Bd. of Control* (2003) 112 Cal.App.4th 371, 383.) Furthermore, when the Legislature intends to authorize recovery of expert witness fees or other expenses, it has shown it knows how to do so. (See, e.g., Code Civ. Proc., § 1036; Corp. Code, § 1305, subd. (e); *Ripley v. Pappadopoulos, supra*, 23 Cal.App.4th at pp. 1624-1625, fn. 15.)

Thus, we reject the holding of *Beasley* and conclude Code of Civil Procedure section 1021.5 authorizes recovery of attorney fees only, not other expenses, in a private attorney general action. In light of this conclusion, the trial court properly limited recovery under the statute to plaintiff's attorney fees.

#### DISPOSITION

The judgment and postjudgment order are affirmed. Both parties' requests for judicial notice are granted. The parties shall bear their own costs on appeal.

**CERTIFIED FOR PUBLICATION**

RYLAARSDAM, J.

I CONCUR:

BEDSWORTH, J.



**Sills, P. J., Dissenting.**

Today's majority decision only confirms the critics' worst caricature of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) -- that it has degenerated into nothing but a feeding frenzy for attorneys who use the law to shake down California businesses and chase jobs out of California.

By contrast, I believe that if the courts exercise the tools they already have -- interpreting statutes in light of reason, common sense and the common law doctrine of substantial compliance, and avoiding absurd results -- the law is *not* the oppressive mechanism that today's result would suggest. I must, therefore, respectfully dissent.

*I. The Statute: Misinterpreted*

Under the way the majority interprets the statute (Bus. & Prof. Code, § 17533.7), the aircraft carrier U.S.S. Ronald Reagan, built by American shipworkers in Newport News, Virginia, could not be said to have been "made in America." Yes, the majority would agree that the great aircraft carrier itself was "substantially" made in America. But they would say that if a single television screen (usually referred to as a "monitor") in the communications section of the ship came from Taiwan, then the ship *itself* was not made in America because a "part thereof" was "entirely or substantially made" outside the United States.

The statute should not be read that way. Statutes must be interpreted to be internally consistent. (*People v. Moroney* (1944) 24 Cal.2d 638, 642-643; *Brown v. Guy* (1959) 167 Cal.App.2d 211, 214 ["It is a cardinal rule of statutory construction that parts of a statute must be construed together and harmonized as far as possible to avoid repugnancy. . . ."])

Granted, we do not have much guidance in the interpretation of the statute. This is the very first appellate decision in the over 43 years since the enactment of section 17533.7 to *ever* interpret this statute. (Our high court once used it as an example of trade regulation that generally affects speech in *Kasky v.*

*Nike, Inc.* (2002) 27 Cal.4th 939, 964, but that was only a passing reference, and no substantive interpretation was made.)

Under the model of the statute adopted by the majority today, a product can concededly be *substantially* made in the United States but *absolutely 100 percent of its parts*, down to -- literally -- every last screw must also have been at least substantially made in the United States. The problem with that interpretation is it reads the word “substantially” out of the statute as it affects the merchandise *as a whole*. And we know the statute refers to merchandise *as a whole* as well as its constituent parts because by its terms it differentiates “merchandise” -- by the use of the word “or” -- from “any article, unit, or part” thereof.”

But an interpretation which requires every last part to be at least substantially made in America renders the word “substantially” useless insofar as it refers to merchandise as a whole. If the Legislature had really meant to say that *every* last part, down to the last screw, had to be at least substantially made in the United States, then it didn’t need to speak of the merchandise *itself* being “substantially made” in the United States, since every last part had to be American anyway.

One might counter that the Legislature really meant every last part and that the reference to “substantially made” in the context of the merchandise as a whole refers only to assembly qua assembly: Supposedly, while every last part had to be American, not all the assembly had to be done in the United States. But that doesn’t work either if you think about the nature of assembly. It means putting at least two parts together to make a third part.

But how does a manufacturer “partially” (but less than “substantially”) assemble merchandise outside the United States with 100 percent American parts? And yet that’s what it would take to save some meaning for the adverb “substantially” if the possibility of less-than-100 percent assembly were the “out” to harmonize the difference between a product itself being “substantially

made” in the United States and a requirement that *every* last part be made in the United States. *Any assembly at all* would, by definition, create a “part thereof” of the merchandise, a part which, the way the majority reads the statute -- could not be American. So we are left, once again, with an interpretation that renders “substantially made” redundant as it applies to the product as a whole.

Our Supreme Court has repeatedly adhered to the rule that statutes are to be interpreted in the light of reason and common sense. (See *People v. Mulholland* (1940) 16 Cal.2d 62, 69 [“We are unable to accept such a construction of the law. It is the duty of the courts to construe such enactments in the light of reason.”]; *Great Western Distillery Products, Inc. v. John A. Wathen Distillery Co.* (1937) 10 Cal.2d 442, 446 [“Statutes are interpreted in light of reason and common sense . . . .”]; *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 292 [“Absurd or unjust results will never be ascribed to the legislature, and it will not be presumed to have used inconsistent provision as to the same subject in the immediate context.”]; *Uhl v. Badaracco* (1926) 199 Cal. 270, 284 [“To adopt the construction contended for by the city would be contrary to common sense and the general policy of the law.”])

It is also well established that the literal meaning of the words of a statute may be disregarded to avoid absurd results. (*People v. Anzalone* (1999) 19 Cal.4th 1074, 1079; *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334, fn. 7; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6; *Silver v. Brown* (1966) 63 Cal.2d 841, 845; *California Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd.* (2003) 112 Cal.App.4th 358, 363; *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1304; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1302; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1427; *Guardianship of Elan E.* (2001) 85 Cal.App.4th 998, 1001; *People v. Pecci* (1999) 72 Cal.App.4th 1500, 1507; *People v. Buena Vista Mines, Inc.* (1996) 48 Cal.App.4th 1030, 1034-1035; *Havlicek v. Coast-to-Coast*

*Analytical Services, Inc.* (1995) 39 Cal.App.4th 1844, 1856; *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698; *California Ins. Guarantee Assn. v. Liemsakul* (1987) 193 Cal.App.3d 433, 439; see also *Eyston v. Studd* (K.B. 1574) 75 Eng. Rep. 688, 2 Plowd. 459.)

Finally, there is the rule of substantial compliance. As explained by our Supreme Court in *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23, 29, “Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the *substance* essential to every *reasonable* objective of the statute.” (Emphasis added.)

All three of these great principles of statutory interpretation -- construction in light of reason and common sense, avoidance of absurdity, and the rule of substantial compliance -- are tailor-made for the case at hand. My colleagues say that the language of the statute is plain. But plainly it is not so plain. There is a real problem with the word “substantially,” which my colleagues have resolved in a way that reads the word right out of the statute insofar as it plainly applies to merchandise as a whole.

Instead of an interpretation that obliterates the word “substantially” when referring to the merchandise itself, I would hold that the most reasonable way to interpret the statute is to recognize that if the merchandise is substantially made in the United States and it is substantially made up of parts made in the United States, then it can still be advertised as made in the United States even though not *every part* was (wholly or substantially) made in the United States.

*This interpretation gives meaning and realistic effect to the intent of the Legislature.* The Legislature cannot possibly have intended to prevent practically every American manufacturer from being able to advertise that its products were made in America. The statute was clearly aimed at substance, catching manufacturers who used substantially foreign parts or outsourced a substantial part of the assembly. It was not aimed at American manufacturers who substantially used American parts and assembled the product in America.

The alternative is too brittle -- requiring every last part in even the most complicated merchandise to be made in America. It ascribes to the Legislature an irrational intent to deprive American manufacturers of the right to claim their products were made in America.

I must therefore respectfully take issue with my colleague's implied refutation of this dissent that they are merely following the statute and are powerless to "rewrite" it. This case is about how the statute should be interpreted. The law requires an interpretation that does not render the statute both self-contradictory and unreasonable.

II. *A Wrong Interpretation*  
*Leads to Consequences At Odds*  
*With Legislative Intent*

Let me take as a given that the Legislature clearly contemplated that *some* products available to American consumers *could*, legitimately under section 17533.7, be advertised as made in America. Let me also take as a corollary to that proposition that the law was never intended to require of American manufacturers the impossible -- which is 100 percent American molecules.

That is not totally the overstatement you might at first think. Consider a hydraulic assembly wholly made of American steel and, for sake of argument, even American screws. But also assume the assembly requires some oil as an internal "part." Under the "every part" interpretation of the statute not even this hypothetical product could be labeled made in America because there was no guarantee that the oil was American in origin: percentagewise in the early 21st century, the odds would be against it.

At oral argument, I asked whether I could advertise my own house for sale -- a house which I watched built from the ground up on land in Orange County, California, presumably located in the USA -- as "Made in the United States," given that some of the plumbing fixtures were made in Germany.

Plaintiff's counsel answered unequivocally that under his interpretation of the statute, *the answer was no*.

Usually, when counsel at oral argument take a brittle, unreasonable position in response to a question testing the limits of their position you know they are in trouble; their position is so inherently unsound that it quickly reduces to absurdity. In this case, alas, the majority has agreed with the brittle interpretation of the statute. To suggest that a house built on Irvine land which has been graded into configurations for new housing by California bulldozer operators, framed by American carpenters, finished by American cabinet makers, plumbers, electricians, plasterers and painters, all with materials manufactured in the United States except for a few nails and fixtures from foreign lands, is not made in the United States simply does not accord with the Legislature's intent.

This is all by way of illustrating that if the statute is to be interpreted under the "every part" test, then almost *nothing* is made in America anymore because there will always be (the present case is a perfect case in point) some screw or minor assembly that won't pass the test. Again, I cannot believe that the Legislature would have, in essence, declared open season on American manufacturers who substantially assemble a product in America made up substantially of American parts.

Today's result is thus the perfect example of the law of unintended consequences. A statute which was designed to prevent fraudulent claims of American manufacture has been interpreted in a way to give incentive for firms to *relocate* plants and jobs overseas. Thus, the majority not only reaches an absurd result, but one which actually frustrates the manifest purposes of the legislation. (Bus. & Prof. Code, § 17533.7.)

The statute is far better written than the majority would have us believe, but one must take a common sense approach in interpreting it. The interpretation proffered by the plaintiffs and adopted by the court actually puts bona fide American manufacturers like Kwikset at a disadvantage against

competitors who assemble everything abroad and export their products back to the United States. Both Kwikset and a Taiwanese exporter of locks are reduced to the same status: Neither can claim to make its products in America even though Kwikset's products substantially *are* made in America.

### III. *Today's Result Sanctions Predatory*

#### *Litigation in the Style of the*

#### *Infamous Trevor Law Group*

I must also take issue with the ridiculously high attorney fee award. \$3 million is too much for a few pins and screws. To award \$3 million in attorney fees for a few screws, pins and a latch assembly is to confirm everything that the law's critics have been saying about it, namely that the law really is a way for underemployed lawyers to *create* business for themselves by harassing California businesses on the basis of some de minimis putative nonconformance with some regulation or law.

The majority does not deal with the attorneys' fee issue on the ground that it wasn't raised in the opening brief and they are correct on the point insofar as it goes. But appellate courts ask for further briefing all the time and this is an issue that cries out for further briefing. That is because even if today's result were correct as a matter of statutory interpretation, the award of attorneys' fees was clearly grossly disproportionate to what has been accomplished by the litigation.

There has been no injury. No breach of contract. No one got hurt. The only money to change hands is the multimillion dollar windfall to the attorneys who brought this action if today's decision is allowed to stand.

And what has been accomplished by this litigation other than the enrichment of the plaintiffs' attorneys? *The only real results are negative, and especially negative to American workers.* If today's decision stands, no firm may dare to advertise "made in USA" on its products, even if entirely assembled or "transformed" in the United States by American workers -- remember, today's

decision proves that courts cannot be counted on to use a rule of substantial compliance.

And without the ability to claim a product is made in the United States --even when that is the fundamental reality -- American firms will be denied their home field advantage and have less incentive to remain in the United States and particularly in California.

I am also afraid that the danger of a double standard is present here. What is the difference between the \$ 3 million attorney fees award here and the petty shakedowns which made the Trevor Law Group infamous in Southern California? Nothing but the size of the law firm and its target. As this court noted in *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316-1317: “The abuse is a kind of legal shakedown scheme: Attorneys form a front ‘watchdog’ or ‘consumer’ organization. They scour public records on the internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization.”

Thus, if the Trevor Law Group sues an auto body shop over not having its license up to date, that is an abuse of the unfair competition law. But if a more established law firm sues a big corporation over an equally trivial putative violation -- it is rewarded with \$3 million in fees. The net result is to bless the same kind of abuse in which the Trevor Law Group engaged -- looking for a hypertechnical violation of some law by a California business and then going after that business under section 17200 as a profit-making venture -- with appellate holy water.

The Legislature never envisioned that a law enacted simply to make sure that claims of “Made in America” are genuine would be used to chase workers and jobs out of California. Now a single spool of foreign thread is enough to sustain a lawsuit.



The unfair competition law is not a bad law, but today it has been abused. One can only hope that the issue will be visited by our Supreme Court as soon as possible.

SILLS, P. J.